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No. 83-5954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WAYNE LINDAHL,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION OUT-OF-TIME FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA AS *AMICI CURIAE*

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NOW COME WILLARD BRONGER, FRANK KACPROWICZ, and ALBERT VEVERKA, by and through one of their attorneys, Max G. Brittain, Jr., and respectfully move this Court pursuant to Rule 42 of the Supreme Court Rules for leave to file a brief *amici curiae* in the above entitled case. The Petitioner has consented to allow said filing, while Respondent was asked but refused to give its consent.

INTEREST OF WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA

Willard Bronger, Frank Kacprowicz and Albert Veverka are the three Petitioners in the case of *Bronger, et al. v. Office of Personnel Management,* 740 F.2d 1552 (Fed.Cir. 1984). They are former civilian air traffic controllers who were separated from their employment with the Department of Defense, but denied a retirement annuity because their time of service as military air traffic controllers was not credited. The initial denial of a retirement annuity by the Office of Personnel Management ("OPM") was upheld by the Merit Systems Protection Board ("MSPB"), and these three former federal employees then timely filed an appeal with the Court of Appeals for the Federal Circuit as directed by the MSPB. OPM, Respondent therein, then argued that said Court did not have jurisdiction to hear their appeal because they were not "employees" under 5 U.S.C. § 7703(a). On July 26, 1984, after Petitioner Lindahl's Brief had been filed with this Court, the Federal Circuit rendered its opinion in *Bronger, supra,* holding that it had jurisdiction and that the Petitioners should prevail on the merits. On October 16, 1984, Respondent OPM filed a Petition For Rehearing And Suggestion For Rehearing En Banc, and concurrently moved to stay proceedings pending this Court's decision in *Lindahl v. OPM,* 718 F.2d 391 (Fed. Cir. 1983) *cert. granted,* 52 U.S.L.W. 3906 (June 18, 1984). The Motion to Stay was summarily granted; Petitioners Bronger, Kacprowicz and Veverka have sinced moved to vacate said stay, but no decision has been rendered. Respondent did not, and has not, petitioned for writ of *certiorari* in *Bronger.*

The jurisdictional issue presented in *Bronger* was not an issue presented to this Court in *Lindahl* until OPM, respondent in both cases, sought (in its brief to this Court which was filed in September of 1984) to have this Court broaden its review to include the holding of the Federal Circuit in *Bronger. (See*

Brief of Respondent, pp. 12-13.) Accordingly, Messrs. Bronger, Kacprowicz and Veverka have been prejudiced by the Government's attempt to litigate their case without notice to them, and by being forced to rely on the necessarily limited effort of Mr. Lindahl to fully present their case, which is of only tangential interest to him, in a mere Reply Brief.

While it is true that this brief *amici curiae* is not timely pursuant to Rule 36 of the Supreme Court Rules, this is due solely to Respondent's unprecedented move in attempting to have this Court review and reverse a subsequent and broader decision of a lower court in the course of reviewing another case where *certiorari* had already been granted on a narrower question. There was no reason to expect that Messrs. Bronger, Kacprowicz and Veverka had an interest in the case of Mr. Lindahl until Respondent herein improperly attempted to broaden this case in its brief filed in September of 1984 (without notice to them), at which time it was already too late to proceed timely under Rule 36. Indeed, they had no notice of Respondent's intentions until October of 1984 when Respondent filed for rehearing and simultaneously sought a stay in their case in the Federal Circuit, where they had already prevailed. Respondent further compounded the prejudice by refusing to consent to their filing a brief *amici curiae* so that said circumstances could be more clearly outlined for this Court. Such unconventional, if not duplicitous, maneuvering on the part of the Respondent has necessitated this motion out-of-time.

CONCLUSION

For all the foregoing reasons, we respectfully urge this Court to grant this motion for leave to file the accompanying *amici* brief in the present case in support of the position of the Petitioner.

Respectfully submitted,

MAX G. BRITTAIN, JR.
Counsel of Record

TERRILL E. PIERCE

Of Counsel
CARL H. DEBROUX

QUESTION PRESENTED

Whether this Court should decline Respondent's suggestion to enlarge the present case to include review of the holding in *Bronger v. Office of Personnel Management*, 740 F.2d 1552 (Fed. Cir. 1984), that nondisability civil service retirement claims can be appealed to the Court of Appeals for the Federal Circuit, and instead limit its holding to disability retirement cases such as that of Mr. Lindahl.

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BRIEF FOR WILLARD BRONGER, FRANK KACPROWICZ, AND ALBERT VEVERKA AS *AMICI CURIAE*

Willard Bronger, Frank Kacprowicz, and Albert Veverka submit this brief *amici curiae* to urge that this Court decline Respondent's suggestion to broaden the issue presently pending before it to include the appeal rights of former employees in retirement cases not subject to 5 U.S.C. § 8347(c).

I.

INTEREST OF WILLARD BRONGER, FRANK KACPROWICZ AND ALBERT VEVERKA

Willard Bronger, Frank Kacprowicz and Albert Veverka are the three Petitioners in the case of *Bronger, et al. v. Office of Personnel Management,* 740 F.2d 1552 (Fed. Cir. 1984). They are former civilian air traffic controllers who were separated from their employment with the Department of Defense, but denied a retirement annuity because their time of service as military air traffic controllers was not credited. The initial denial of a retirement annuity by the Office of Personnel Management ("OPM") was upheld by the Merit Systems Protection Board ("MSPB"), and these three former federal employees then timely filed an appeal with the Court of Appeals for the Federal Circuit as directed by the MSPB. OPM, Respondent therein, then argued that said Court did not have jurisdiction to hear their appeal because they were not "employees" under 5 U.S.C. § 7703(a). On July 26, 1984, the Federal Circuit rendered its opinion in *Bronger, supra,* holding that it had jurisdiction and that the Petitioners should prevail on the merits. On October 16, 1984, Respondent OPM filed a Petition For Rehearing And Suggestion For Rehearing En Banc, and concurrently moved to stay proceedings pending this Court's decision in *Lindahl v. OPM,* 718 F.2d 391 (Fed. Cir. 1983) *cert. granted,* 52 U.S.L.W. 3906 (June 18, 1984). The Motion to Stay was summarily granted; Petitioners Bronger, Kacprowicz and Veverka have since moved to vacate said stay, but no decision has yet been rendered. Meanwhile, without notice to counsel for *Bronger,* Respondent filed its brief before this Court in *Lindahl,* and sought therein to have this Court review and reverse the jurisdictional issue of the *Bronger* decision. (Brief of Respondent, pp. 12-13).

Respondent's conduct in this regard has severely prejudiced the rights of Messrs. Bronger, Kacprowicz and Veverka in that it has effectively sought *ex parte* resolution of their

claims. Respondent failed to file a petition for writ of *certiorari* in *Bronger*, but nevertheless seeks this Court's review of the jurisdictional issues of said decision in its brief before this Court in *Lindahl*. It is for this reason that Messrs. Bronger, Kacprowicz and Veverka seek this Court's leave to participate before this Court as *amici curiae*.

II.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Federal Circuit in *Lindahl v. OPM, supra*, held that Lindahl was precluded by 5 U.S.C. § 8347(c) from judicial review of the Merit Systems Protection Board's affirmance of the Office of Personnel Management's decision that Lindahl was not entitled to a disability retirement annuity. It expressly declined to reach the issue of whether former employees denied a *non*disability retirement annuity by the OPM and affirmed by the MSPB could obtain judicial review. This question was reached in *Bronger v. OPM, supra*. The OPM improperly seeks review by this Court of the jurisdictional issue decided in *Bronger* even though no petition for writ of *certiorari* was filed therein, simply by so requesting in its brief on a different case, namely, *Lindahl*.

III.

ARGUMENT

The Issue In This Case Is Whether § 8347(c) Precludes Judicial Review

It is clear that the petition for *certiorari* in this case, and the Brief of the Petitioner which was filed with this Court prior to the decision of the Federal Circuit in *Bronger,* present only a narrow jurisdictional question, namely, whether the Court of Appeals for the Federal Circuit has jurisdiction to review decisions of the OPM and the MSPB with respect to nonfactual determinations in physical disability retirement cases.

The Petition for *certiorari* in *Lindahl* succinctly stated the issues for review as follows:

> Questions presented: (1) Does Article III court have jurisdiction to review final decision of MSPB where board action violated petitioner's constitutional right to due process, and Department of Navy violated petitioner's rights in discharging him? (2) Did Navy and MSPB violate petitioner's due process rights by discharging him from employment in violation of its regulation and by imposing burden of proof on him in violation of 5 USC 7701(c)?

52 U.S.L.W. 3925.

The Federal Circuit in its decision below concluded that judicial review of physical disability retirement claims is precluded by 5 U.S.C. § 8347(c). *Lindahl v. OPM, supra,* 718 F.2d at 393. The arguments why this conclusion is erroneous have been ably set forth by Petitioner Lindahl and the various *amici curiae* who have supported him. However, it simply cannot be disputed that the lower court's decision in *Lindahl* rested exclusively on the provisions of § 8347; indeed, it explicitly stated that it was not addressing the broader issue subsequently decided in *Bronger:*

> We decided here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an

> MSPB decision affirming the denial of a claim for annuity following a *voluntary physical disability* retirement, a decision reached by MSPB under the authority provided in it § 8347(d)(1).
>
> * * * *
>
> We need not, and hence do not, decide in this case whether all decisions of MSPB under § 8347(d)(1) are denied judicial review by § 8347(c) .... It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

Lindahl v. OPM, 718 F.2d at 393, 399 (emphasis added). Such circumspection is only proper, as it is a well established and uniform course of appellate review procedure to decline to review questions not necessary to a decision by an appellate court. See, e.g., *Sun Insurance Office v. Scott*, 284 U.S. 177 (1931).

The Federal Circuit reiterated the narrowness of its holding in *Lindahl* when it decided *Bronger*. It commenced its *Bronger* opinion by quoting the first sentence above from *Lindahl* and emphasizing that "[t]his case therefore differs from, and is not controlled by *Lindahl*." 740 F.2d at 1554. Indeed, the differences between the two cases are the very reason that court held that it did not have jurisdiction to hear Lindahl's appeal, while it held that it did have jurisdiction over Bronger's appeal:

> [T]he statutory linchpin of *Lindahl*, the section 8347(c) "finality clause" which we held to bar judicial review in that case, applies only to "questions of disability ..." ... Recognizing that the *Lindahl* rationale does not expressly govern jurisdiction here, OPM advances an alternative argument which the Court in *Lindahl* found unnecessary to address.

Id. at 1554. This argument, that the court did not have jurisdiction to review appeals of persons not presently "employees or applicants for employment" under 7703(a), was rejected

as "border[ing] on the frivolous." 740 F.2d at 1555. It is obvious that Respondent herein, which is also the respondent in *Bronger,* does not agree with this holding. In such circumstances, it may, of course, petition this Court for *certiorari* in *Bronger* and this Court may then address whether it deems the case worthy of its discretionary review. Respondent has not done so. Instead, it has attempted to circumvent normal judicial procedure by seeking this Court's review of the *Bronger* holding through *Lindahl,* despite the fact that in the latter case the lower court expressly refused to reach the broader question of whether nondisability civil service retirement claims can be appealed to the Federal Circuit pursuant to 5 U.S.C. § 7703. The Brief of Respondent acknowledges that this question was not reached until *Bronger* was decided, but nevertheless it asserts that:

> Since the Court now has the benefit of the Court of Appeals views, there is no reason to postpone consideration of the [broader] jurisdictional issue, particularly since two other Court of Appeals have reached a contrary conclusion. *Lancellotti v. OPM,* 704 F.2d 91, 95-96 (3rd Cir. 1983); *Morgan v. OPM,* 675 F.2d 196, 198 (8th Cir. 1982).

(Resp. Br. pp. 12-13). To the contrary, however, there is every reason for this Court to postpone consideration of the broader issue, the most important of which is that this simply is not how our judicial system works. As a famous jurist once had occasion to note, "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell,* 256 U.S. 465, 476 (1921) (J. Brandeis). Respondent's action in this regard is inexplicable, and demonstrates a gross disregard for the normal processes of this Court. In addition, the "split" in the Circuits referred to by Respondent is a mere phantom. The two cases it cites are both *disability* retirement cases and therefore, as in the Federal Circuit's decision in *Lindahl,* the preclusive effect of § 8347(c) was the only issue necessary to be addressed.

The Court of Appeals for the Federal Circuit is the court endowed by Congress with "exclusive jurisdiction . . . of an appeal from a final order or final decision of the Merit Systems Protection Board pursuant to Sections 7703(b)(1) and 7703(d) of title 5". 28 U.S.C § 1295(a)(9). That Court ruled that it had jurisdiction over an appeal by former federal employees from a final order of the MSPB denying an early retirement annuity. *Bronger, supra.* Furthermore, this decision was not rendered until several months after this Court granted *certiorari* in the instant case. Unless and until *Bronger* (or a subsequent case with the same holding) is appealed to this Court, that decision is the law, and even the Government must abide by it. It is submitted that Respondent's approach is disingenuous at best.

Should this Court decide that the lower court erred in holding that § 8347(c) precluded Lindahl from any judicial review of MSPB's denial of his claim for a disability annuity, then this case should be remanded to the Federal Circuit for resolution of all issues not previously addressed. This is the normal procedure; one which has allowed for certainty in the potential disposition of claims. This Court has traditionally been loath to unnecessarily broaden the scope of its pronouncements, at least in part to avoid that which can result when the ramifications and consequences of a particular question have not been fully explored. Such is the case here. The broader question presented in *Bronger* has been only tangentially addressed in the briefs of the parties, and their respective *amici curiae.* There is absolutely no reason why this Court need heedlessly embark into uncharted waters. Respondent's hapless suggestion that this Court do so should be roundly rejected.

CONCLUSION

For all of the foregoing reasons, this Court should decline Respondent's suggestion to broaden the issue in this case, and limit its holding to disability retirement cases such as that of Mr. Lindahl.

Respectfully submitted,

MAX G. BRITTAIN, JR.
Counsel of Record

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